Supreme Court, U.S.
FILED
MAY 14 1999
CLERK

No. 98-1681

IN THE

Supreme Court of the United States

In re KAREN S. DAY,

Petitioner.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

JO ANNE ROBINSON
Acting Corporation Counsel
CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division
Office of Corporation Counsel
District of Columbia
441-4th St., N.W., Sixth Floor
Washington, D.C. 20001
(202) 727-6252

Attorneys for Respondent
District of Columbia
Court of Appeals

LEONARD H. BECKER*
District of Columbia Bar Counsel
MICHAEL S. FRISCH
Senior Assistant Bar Counsel
Office of Bar Counsel
515-5th St., N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

Attorneys for Respondents
District of Columbia Board on
Professional Responsibility and
Office of Bar Counsel

* *Counsel of Record*

152896

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

1708

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals correctly ordered Petitioner's disbarment, based upon the Florida Supreme Court's acceptance of her resignation from the Florida Bar (the functional equivalent of permanent disbarment), where she faced a pending disciplinary investigation of serious trust-account irregularities?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinion Below	1
Statement of Jurisdiction	1
Statute and Rules	1
Statement of Proceedings Below	1
Reasons for Denying the Writ	3
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Addams, 579 A.2d 190 (D.C. 1990) 6, 7

In re Alfieri, 428 So. 2d 662 (Fla. 1983) 4

Application of Harper, 84 So. 2d 700 (Fla. 1956) . 4

Boddie v. Connecticut, 401 U.S. 371 (1971) 5

Consumers United Ins. Co. v. Smith, 644 A.2d 1328 (D.C. 1994) 8

D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) 5

In re Ferguson, 404 So. 2d 746 (Fla. 1981) 4

Florida Bar v. Aglow, 445 So. 2d 1022 (Fla. 1984) 4

Florida Bar v. Caudill, 468 So. 2d 989 (Fla. 1985) 3

Florida Bar v. Owens, 389 So. 2d 206 (Fla. 1980) 4

Florida Bar v. Sherry, 445 So. 2d 1021 (Fla. 1984) 4

Florida Bar v. West, 380 So. 2d 431 (Fla. 1980) .. 4

Cited Authorities

Page

Florida Bar v. Willingham, 386 So. 2d 553 (Fla. 1980) 4

In re Green, 357 So. 2d 729 (Fla. 1978) 4

In re Pierson, 624 A.2d 1229 (D.C. 1993) 5

In re Richardson, 692 A.2d 427 (D.C. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1056, 140 L. Ed. 2d 118 (1998) 3

In re Sheridan, 680 A.2d 439 (D.C. 1996) 5

In re Vaught, 342 So. 2d 820 (Fla. 1977) 4

United States Constitution:

U.S. Const., art. IV, § 1 8

Rules:

D.C. App. R. XI, § 11 4

D.C. App. R. XI, § 11(c) 8

D.C. App. R. XI, § 11(d) 3

Florida Rule 3-7.10 5

Florida Rule 3-7.12 5

Other Authority:

D.C. Code Prof. Resp. 9-103(A) 6

TABLE OF APPENDICES

Page

Appendix A — Relevant Statutory Provision And Rules Involved 1a

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet . App. 1) appears at 717 A.2d 883 (D.C. 1998).

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Court of Appeals for which review is sought was entered December 10, 1998. Petitioner filed a petition for rehearing or rehearing *en banc*, which the court denied by order entered January 19, 1999. Petitioner filed his petition for writ of certiorari on or about April 19, 1999.

STATUTE AND RULES

The pertinent statute conferring jurisdiction on the District of Columbia Court of Appeals to discipline members of its Bar, and relevant rules of professional conduct and of procedure prescribed by the Board on Professional Responsibility, are set out in an Appendix to this brief.

STATEMENT OF PROCEEDINGS BELOW

Petitioner is an attorney disbarred in 1998 by the District of Columbia Court of Appeals (the "District of Columbia Court" or "court") on the basis of the Florida Supreme Court's acceptance of her resignation from the Florida Bar some 11 years earlier, while she faced an investigation of serious trust-account irregularities.[1] At the

---

1. Petitioner is referred to throughout the proceedings below as "Respondent." In keeping with this Court's practice, we refer to her in this brief as the "Petitioner."

time of her disbarment by the District of Columbia Court, she maintained an immigration-law practice in Florida on the strength of her District of Columbia license (Pet. App. 4a).

In 1988, while Petitioner was the subject of a Florida Bar Counsel investigation, she filed a petition for leave to resign from the Florida Bar (Pet. App. 45a). Florida Bar Counsel opposed the application as drawn, noting that Bar Counsel was conducting a preliminary investigation of trust-account violations amid indications of "a basis for possible allegations of serious trust account misappropriations in addition to the improper and inadequate trust account record keeping and instances of trust checks returned by the bank for insufficient funds" (*id.* at 47a). Petitioner then filed an amended petition for leave to resign, in which she acknowledged her awareness of the charges against her and her willingness to accept the functional equivalent of permanent disbarment (*id.* at 50a). Florida Bar Counsel did not oppose the amended petition, noting that the proposed sanction of "permanent resignation" provided a more severe sanction than disbarment (*id.* at 53a). On November 17, 1988, the Florida Supreme Court (the "Florida Court") granted Respondent's amended petition, effective December 19, 1988 (*id.* at 56a).

Petitioner failed to comply with her obligation to report the action of the Florida Court to the District of Columbia Bar (Pet. App. 4a). In May 1996, Florida Bar authorities brought the matter to the attention of District of Columbia Bar Counsel, who reported the Florida Court's action to the District of Columbia Court (*id.*). By that time, the Florida Bar had discarded its investigatory file (*id.* at 10a). On November 21, 1996, the District of Columbia Court

entered an order suspending Respondent on an interim basis pursuant to D.C. App. R. XI, § 11(d) and directing the Board on Professional Responsibility (the "Board") to recommend promptly whether reciprocal discipline should be imposed (*id.* at 18a). On May 2, 1997, the court denied Petitioner's petition for rehearing or rehearing *en banc* of the interim suspension order (*id.* at 23a).

The Board received pleadings from Petitioner and Bar Counsel, including an affidavit in which Petitioner acknowledged thefts from her trust account but blamed her former husband (Pet. App. 31a). On May 15, 1997, after hearing oral argument from the parties, the Board filed its report with the District of Columbia Court, recommending that Petitioner be disbarred (*id.* at 25a). The court adopted the Board's report and ordered disbarment (*id.* at 1a). Petitioner filed a timely petition for rehearing, which the court denied on January 19, 1999 (*id.* at 16a). The present petition for writ of *certiorari* followed thereafter.

REASONS FOR DENYING THE WRIT

1. The District of Columbia Court correctly concluded, as it had in *In re Richardson*, 692 A.2d 427 (D.C. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1056, 140 L. Ed. 2d 118 (1998), that the Florida Court's order accepting Petitioner's resignation from the Florida Bar in the face of pending ethical charges constituted "discipline."[2] On that

---

2. At the time Respondent resigned, the Florida Court had established that a resignation in lieu of disciplinary proceedings amounted to discipline. *See, e.g., Florida Bar v. Caudill*, 468 So. 2d 989 (Fla. 1985) (per curiam) (permitting resignation without leave to seek reinstatement where attorney subject to investigation

(Cont'd)

basis, the District of Columbia Court properly may impose reciprocal discipline under D.C. App. R. XI, § 11 (Pet. App. 1a). The court rejected the contention that its imposition of a disciplinary sanction on the strength of the Florida proceeding would deny Petitioner due process. The court correctly concluded that Petitioner had had notice of the allegations against her in Florida and of the sanction to be imposed if she elected to resign in lieu of defending the disciplinary proceeding there. (*Id.* at 5a-7a). Once she voluntarily accepted the equivalent of permanent disbarment, having deliberately bypassed her right to any

---

(Cont'd)
for trust-account violations); *Florida Bar v. Aglow*, 445 So. 2d 1022 (Fla. 1984) (per curiam) (petition for resignation granted where attorney disbarred on consent in another jurisdiction in connection with improper handing of estate); *Florida Bar v. Sherry*, 445 So. 2d 1021 (Fla. 1984) (per curiam) (granting resignation of attorney who entered guilty plea to charge of conspiracy to traffic in controlled substances); *In re Alfieri*, 428 So. 2d 662 (Fla. 1983) (per curiam) (resignation with right to reapply equivalent to disbarment); *In re Ferguson*, 404 So. 2d 746 (Fla. 1981) (per curiam) (resignation granted where attorney charged with misappropriation from escrow and trust accounts); *Florida Bar v. Owens*, 389 So. 2d 206 (Fla. 1980) (per curiam) (granting resignation of attorney under investigation for misappropriation and conversion of client funds); *Florida Bar v. Willingham*, 386 So. 2d 553 (Fla. 1980) (per curiam) (granting petition for resignation by attorney who committed misconduct in connection with handing of client funds); *Florida Bar v. West*, 380 So. 2d 431 (Fla. 1980) (per curiam) (criminal conviction of mortgage fraud); *In re Green*, 357 So. 2d 729 (Fla. 1978) (per curiam) (felony possession of marijuana and other misconduct); *In re Vaught*, 342 So. 2d 820 (Fla. 1977) (per curiam) (misappropriation of client funds held in trust); *Application of Harper*, 84 So. 2d 700 (Fla. 1956) (permitting resignation complies with court's duty to protect public and integrity of courts).

further process in Florida, she waived her right to a plenary or *de novo* hearing in the District of Columbia on the underlying charges of misconduct. *Accord: In re Sheridan*, 680 A.2d 439 (D.C. 1996); *In re Pierson*, 624 A.2d 1229 (D.C. 1993) (per curiam).

2. The Florida resignation procedure underlying the District of Columbia Court's order of disbarment satisfied the constitutional requirement of a voluntary, knowing waiver of the right to a hearing on pending charges. *Cf. D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). The Florida rules governing disciplinary resignation at the pertinent time afforded Petitioner ample notice of the nature of the charges against her and of the sanction to be imposed if she elected to resign in lieu of defending a disciplinary proceeding. Florida Rules 3-7.10, 3-7.12; *cf. Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971). In her petition to the Florida Court, Petitioner admitted that she knew the nature of the charges against her and that court-imposed disciplinary consequences would attach to her resignation in the face of disciplinary charges. Having waived a hearing in Florida, Petitioner cannot now complain that she became subject in the District of Columbia to the collateral consequences of her election.

The District of Columbia Court correctly summarized the rationale for rejecting Petitioner's contention:

> However motivated by her difficulties at the time, Day was aware of her options and made her choice of discipline. In her numerous arguments Day ignores the fact that if there was no hearing and formal adjudication in Florida it is because she voluntarily chose to forego that

> opportunity. As Day knowingly and voluntarily waived her right to any further process in the Florida proceedings, she consequently waived her right to a hearing there — and here — on the underlying charge of misconduct

(Pet. App. 7a).

3. Petitioner's attacks upon the District of Columbia Court's judgment do not warrant this Court's review. Her contention that she was disbarred without evidence of wrongdoing, in supposed violation of her due-process rights, ignores that she short-circuited the evidentiary process in Florida when she submitted her resignation in the face of the Florida Bar's pending ethical investigation and then breached her obligation to report the Florida Court's action to the District of Columbia Bar.

Petitioner's contention that the District of Columbia Court unfairly taxed her with a new disciplinary charge, founded upon the averments of her affidavit submitted to the Board in opposition to reciprocal discipline, misreads the record below. The evidence before the District of Columbia disciplinary authorities, including Petitioner's petition to resign in Florida and her self-serving affidavit to the Board, demonstrated that while practicing in Florida, she had failed to hold entrusted client funds in escrow, thereby committing misappropriation. In the District of Columbia, as elsewhere, an attorney's intentional or reckless misappropriation of entrusted funds results in her disbarment. D.C. Code Prof. Resp. 9-103(A); *cf. In re Addams*, 579 A.2d 190 (D.C. 1990) (*en banc*).[3] A lesser

3. In the District of Columbia, the Rules of Professional Conduct superseded the former Code of Professional Responsibility (Cont'd)

sanction may be imposed if the misappropriation is the result of the attorney's simple negligence. *In re Addams*, *supra*.

Here, consistently with the court's rules governing reciprocal-discipline proceedings, the Board afforded Petitioner the opportunity to demonstrate that the court should not impose disbarment as the functional equivalent of the Florida Court's acceptance of Petitioner's disciplinary resignation. Her affidavit, submitted in an attempt to meet her burden, raised more questions than it answered. She acknowledged that she had failed to safeguard entrusted funds but blamed her former husband, leaving unexplained the circumstances under which her husband had had access to the trust account and she had failed to notice his alleged defalcations. Her omissions in this regard were particularly telling in view of her concession that she had become aware that her husband had a criminal background and was under investigation for wrongdoing in connection with ongoing business activities at the time of the misappropriations (Pet. App. 11a-12a). Even after the Board rendered its report, noting the deficiencies in her submission, she made no effort to supplement her evidentiary showing before the Board or the court (*id.* at 12a). Far from fashioning a new charge of ethical misconduct in mid-proceeding, as Petitioner now contends, the Board and the court applied well-settled principles of District of Columbia disciplinary law.

4. Petitioner's final contention, that the District of Columbia Court's procedures governing reciprocal discipline somehow deprived her of due process, overlooks

---

(Cont'd)
effective January 1, 1991, subsequent to the date of Petitioner's misconduct in Florida. The text of the former Code provision appears in the Appendix to this brief.

that the court would have acted consistently with due process in denying Petitioner any opportunity whatever to mount a collateral attack in the District of Columbia upon the Florida Court's judgment. *Cf.* U.S. Const., art. IV, § 1; *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328, 1347-48 (D.C. 1994) (full faith and credit). Instead, the court afforded Petitioner, as the court does other, similarly situated attorneys holding multiple bar memberships, the opportunity to demonstrate her entitlement to relief from the effect normally accorded the judgments of disciplining courts of other jurisdictions. D.C. App. R. XI, § 11(c).[4] Thus, Petitioner was permitted an opportunity to show that the Florida procedure was lacking in due process or was affected by an infirmity of proof, that imposition of identical discipline would result in a grave injustice, or that the misconduct in Florida was not misconduct in the District of Columbia or warranted substantially different discipline (*id.*). That Petitioner failed to carry her evidentiary burden on any of the available grounds of exculpation or mitigation does not mean that the District of Columbia's reciprocal-discipline procedures were constitutionally deficient or that this Court should review them. Similarly, the District of Columbia Court's eminently correct determination that Petitioner's evidentiary showing was inadequate to meet her burden does not warrant this Court's consideration.

---

4. The text of Section 11(c) is set out in the Appendix to this brief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JO ANNE ROBINSON
Acting Corporation Counsel
CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division
Office of Corporation Counsel
District of Columbia
441-4th St., N.W., Sixth Floor
Washington, D.C. 20001
(202) 727-6252

Attorneys for Respondent
District of Columbia
Court of Appeals

LEONARD H. BECKER*
District of Columbia Bar Counsel
MICHAEL S. FRISCH
Senior Assistant Bar Counsel
Office of Bar Counsel
515-5th St., N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

Attorneys for Respondents
District of Columbia Board on
Professional Responsibility and
Office of Bar Counsel

* *Counsel of Record*